IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:	)	In Proceedings
	)	Under Chapter 13
SCOTT A. JENKINS,	)	
	)	NO. BK 93-50706
Debtor.	)	
	)	
SCOTT A. JENKINS,	)	
	)	
Plaintiff,	)	
	)	ADVERSARY NO.
vs.	)	93-5035
	)	
MERCANTILE BANK OF ST. LOUIS, N.A., and ROGER MARTIN, d/b/a M & M AGENCY,	)	
	)	
Defendants.	)	

MEMORANDUM

Upon plaintiff's default in payments under a loan from Mercantile Bank of St. Louis, N.A. ("Mercantile" or "bank"), secured by plaintiff's 1991 Chevrolet Camaro Z-28, Mercantile, incident to repossession and sale of the car, engaged Roger Martin, d/b/a/ M & M Agency ("M & M") to tow the car from plaintiff's residence in Bethalto, Illinois, to M & M's place of business in St. Louis, Missouri, and to store it until the time of sale. Soon after M & M towed the car to its lot, the plaintiff filed a petition for relief under chapter 13 of the Bankruptcy Code. Thereafter, plaintiff's bankruptcy counsel sought to have the car returned to plaintiff. However, counsel's requests were refused by both M & M and Mercantile, who claimed that M & M had a valid, possessory lien on the car for its towing and storage charges of $465.00 which would be

defeated if the car were released without collection of the charges.

Due to plaintiff's inability to recover the car without first paying M & M, he filed the action now before the Court seeking an order directing defendants to turn over the car and awarding him attorney fees incurred as a result of defendants' violation of the automatic stay. Plaintiff argues that Mercantile had no authority to allow M & M to acquire a lien against the car and that, consequently, any lien held by M & M is not valid; that Mercantile has a contractual obligation to M & M to pay the towing and storage charges which it may then add to its claim in the bankruptcy case; and that Mercantile is adequately protected by the debtor's payments to the trustee. In response, Mercantile and M & M contend that M & M's lien is valid because Mercantile had both contractual and statutory authority to engage M & M to tow and store the car; that M & M's lien is possessory, requiring plaintiff to pay the towing and storage charges before M & M is required to release the car; and that Mercantile and M & M are entitled to adequate protection as a condition precedent to the release of the car to plaintiff.

Mercantile has filed an amended proof of claim in plaintiff's bankruptcy case indicating that it has a secured claim of $10,087.50 and an unsecured claim of $749.36. On October 20, 1993, plaintiff amended his schedules to add M & M as a creditor having an unsecured claim of $465.00. M & M has not filed a proof of claim in the bankruptcy proceeding.

In United States v. Whiting Pools, Inc., 462 U.S. 198 (1983),

the Supreme Court held that a secured creditor in possession of the debtor's property at the time of the bankruptcy filing is required by sections 542(a)[1] and 363[2] of the Bankruptcy Code to return the property to the bankruptcy estate and "to seek protection of its interest according to the congressionally established bankruptcy procedures, rather than by withholding the seized property from the debtor's efforts to reorganize." Whiting Pools, 462 U.S. at 212.[3] That protection is afforded by granting the secured creditor adequate protection to replace the protection afforded by possession. E.g., Whiting Pools, 462 U.S. at 204; In re World Communications, Inc., 72 B.R. 498, 502 (D. Utah 1987); In re Robinson, 89 B.R. at 683. Turnover is required even when the creditor is secured only by a lien which terminates upon loss of possession. In re Robinson, 89 B.R. at

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[1]Section 542(a) requires "an entity . . . in possession . . . of property that the trustee may use, sell, or lease under section 363" to deliver the property to the trustee. 11 U.S.C. § 542(a).

[2]Sections 363(b), (c) and (e) authorize the trustee to use, sell or lease any property of the estate, including property in which a creditor has a secured interest, as long as that creditor's interest is adequately protected. 11 U.S.C. §§363(b), (c), (e). See Whiting Pools, 462 U.S. at 203-04. A chapter 13 debtor in possession is granted the powers and duties of a trustee under sections 363(b) and (e) by virtue of 11 U.S.C section 1303. E.g., In re English, 20 B.R. 877, 879 n.6 (Bankr. E.D. Pa. 1982).

[3]In Whiting Pools, the Internal Revenue Service had seized a debtor's property to satisfy a tax lien prior to the debtor filing a chapter 11 petition. Although the case was decided in the context of a chapter 11 case, it has been held to be equally applicable to chapter 13 proceedings. E.g., In re Richardson, 135 B.R. 256, 257 (Bankr. E.D. Tex. 1992); In re Robinson, 89 B.R. 682, 683 n.2 (Bankr. S.D. Ohio 1988); In re Sutton, 87 B.R. 46, 49 n.1 (Bankr. S.D. Ohio 1988); In re Attinello, 38 B.R. 609, 611 (Bankr. E.D. Pa. 1984); In re Titel, 37 B.R. 173, 174-75 (Bankr. D. Ariz. 1984); In re Robinson, 36 B.R. 35, 37-38 (Bankr. E.D. Ark. 1983).

683.

In arguing that turnover is inappropriate in this case, defendants rely on In re Crowe, 160 B.R. 299 (Bankr. N.D. Tex. 1993), in which the court denied the debtors' request for turnover of a truck based on the debtors' failure to demonstrate how a statutory mechanic's lien for repairs, which terminated upon loss of possession, could be preserved in the face of turnover. The Court is not persuaded by this reasoning. Rather, the Court agrees with the suggestion in Robinson, 89 B.R. at 683, that the bankruptcy judge can fashion the turnover order to preserve and protect the lien status of a creditor who is secured by a possessory lien. In fact, the suggestion has already been followed in the instant case since the defendants agreed to turn over the car to plaintiff with the understanding that any lien M & M had would not be sacrificed by yielding possession to plaintiff. Accordingly, M & M and Mercantile were required to turn over the car upon the bankruptcy filing provided that their respective interests in the car were adequately protected.

The Court will next examine what constitutes adequate protection for these creditors. The concept of adequate protection is not defined in the Bankruptcy Code. Although examples of adequate protection are illustrated in section 361 of the Code,[4] the remedy must be fashioned

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[4]Section 361 provides:

> When adequate protection is required under section . . . 363 . . . of an interest of an entity in property, such adequate protection may be provided by--
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> (1) requiring the trustee to make a cash payment or periodic cash payments to such

on a case by case basis. E.g., In re Washington, 137 B.R. 748, 751 (Bankr. E.D. Ark. 1992). The purpose of adequate protection is to "assure the . . . recoverability of the lien value in the interim period between the filing of the petition and the acceptance of a plan of reorganization." Id. Thus, a creditor is entitled to receive adequate protection only to the extent of its secured interest in the collateral. See, e.g., 1 Robert E. Ginsberg & Robert D. Martin, Bankruptcy: Text, Statutes, Rules § 3.05[c][3], at 3-59 (3d ed. 1992).

The parties have invested considerable effort disputing the issue of whether or not M & M has a valid lien on the debtor's car. However, this effort has been misplaced. Even if the Court assumes arguendo that M & M holds a valid lien on the car, the record fails to demonstrate that M & M has a lien senior to the lien of Mercantile entitling it to immediate and full payment or to adequate protection of its interest. If, indeed, M & M holds the junior lien, a prospect

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> entity, to the extent that the . . . use, sale, or lease under section 363 . . . results in a decrease in the value of such entity's interest in such property;
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> (2) providing to such entity an additional or replacement lien to the extent that such . . . use, sale, [or] lease . . . results in a decrease in the value of such entity's interest in such property; or
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> (3) granting such other relief, other than entitling such entity to compensation allowable under section 503 (b) (1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

11 U.S.C. section 361.

which appears likely,[5] then it has no secured interest in the car entitled to adequate protection because Mercantile and M & M concede that Mercantile is undersecured by $749.36.

As to Mercantile, since it is an undersecured creditor, it is

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[5]Section 430.040 of the Missouri Revised Statutes provides, in pertinent part, that a prior perfected security interest on an automobile is senior to the lien for storage created by section 430.020. Section 430.040 states in pertinent part:

> 2. [T]he lien [under section 430.020] shall not take precedence over or be superior to any prior lien on the property, created by any financing statement on the same, duly perfected in accordance with the laws of this state, without the written consent of the secured party or the legal holder of the security agreement.

Mo. Rev. Stat. § 430.040.2. However, the Missouri Court of Appeals has held that a security interest on a vehicle recorded in another state, but not filed or recorded in Missouri, does not have priority over a lien arising later in time under section 430.020. See, e.g., Jackson v. Kusmer, 411 S.W. 2d 257, 259 (Mo. Ct. App. 1967) (decided under prior version of section 430.040.2 requiring chattel mortgage to be "duly filed or recorded in accordance with the laws of this state"). See also Gale & Co. v. Hooper, 330 S.W. 2d 826, 827 (Mo. 1959), aff'd 323 S.W. 2d 824, 828-830 (Mo. Ct. App. 1959) (confining its approval of underlying policy adopted by Court of Appeals to "precisely limited circumstances" in which priority of common law artisan's lien (rather than statutory lien) and previously filed chattel mortgage are at issue); Mack Motor Truck Corp. v. Wolfe, 303 S.W. 2d at 700-01 (mortgage recorded in state other than Missouri held subordinate to artisan's common law lien which arose later in time).

Here, Mercantile's security interest was perfected by notation on the certificate of title issued by Illinois. In a case decided under the current enactment of section 430.040.2, Ozark Financial Services v. Turner, 735 S.W. 2d 374, 377 (Mo. Ct. App. 1987), the Missouri Court of Appeals has indicated that a security interest which is noted on the face of the title issued by a state other than Missouri would be "duly perfected in accordance with the laws of (Missouri]" as required by section 430.040.2 and would afford senior status to such lien. See Mo. Rev. Stat. 301.600.3(2)(a); In re Roach, 115 B.R. 200, 200-201 (Bankr. E.D. Mo. 1990); In re Brown, 55 B.R. 172, 173-74 (Bankr. W.D. Mo. 1985).

entitled to adequate protection only to the extent of its secured interest in the collateral.[6] Plaintiff's chapter 13 plan proposes to pay Mercantile the value of the car plus interest of eight percent over the term of the plan. Within thirty days after filing the plan, plaintiff was required to begin paying to the trustee the payments proposed by the plan. 11 U.S.C. section 1326(a)(1). Upon confirmation, these accumulated funds will be distributed according to the plan. 11 U.S.C. section 1326(a)(2). Thus, absent a showing that these payments are insufficient to pay Mercantile the value of its secured interest, Mercantile is due no more. See, e.g., In re Johnson, 145 B.R. 108, 113-14 (Bankr. S.D. Ga. 1992), rev'd on other grounds, No. CV692-132, 1994 WL 97571 (S.D. Ga. Mar. 7, 1994).

The ultimate burden of proof, where adequate protection is concerned, is on the debtor. 11 U.S.C. section 363(o)(1). However, the creditor must first present some evidence that its interest is not adequately protected. E.g., In re Johnson, 145 B.R. at 114; In re Hinckley, 40 B.R. 679, 682-83 (Bankr. D. Utah 1984). Among other methods, the creditor may show that the collateral is uninsured, e.g., In re Washington, 137 B.R. at 751; In re Richardson, 135 B.R. at 259-60, or that it is depreciating in value post-petition so that the creditor will suffer an uncompensated decline in the value of its collateral if the debtor dismisses the case prior to plan confirmation. E.g., In re Hinckley, 40 B.R. at 681-82.

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[6]None of the parties has put into issue the value of Mercantile's secured claim. See Fed. R. Bankr. P. 3001(f) ("A proof of claim . . . shall constitute prima facie evidence of the validity and amount of the claim").

Here, plaintiff contends, and Mercantile does not dispute, that the car is insured. Thus, Mercantile must show that the collateral is depreciating in value during the pre-confirmation period if it is to receive additional adequate protection. Although Mercantile has alleged that the car is depreciating in value, it has placed no evidence before the Court to prove that the car has depreciated, or will do so, between the petition date and the time of plan confirmation, or to show the extent of that depreciation. Mercantile has not contended that the debtor has failed to maintain the car properly. Nor has it supported its request for adequate protection with, for example, "a properly sworn affidavit of a qualified appraiser, specifically stating the amount of the monthly depreciation." Id. at 683. "To be reasonable, a request for adequate protection whenever possible should be specific and should be supported by probative evidence." Id. at 682-83. The Court cannot award adequate protection based on "[a] naked demand," id. at 683, and pure conjecture "unsubstantiated by admissible evidence." Id.

Moreover, the Court cannot, as Mercantile suggests, simply award Mercantile the towing and storage costs as its measure of adequate protection. Mercantile has failed to convince the Court that the sum of the towing and storage costs bears any relationship to that amount to which Mercantile may be entitled for adequate protection. Were the Court to award Mercantile the $465.00 which it requests, it would be acting on a purely arbitrary basis.

Finally, plaintiff, in his complaint, requests that defendants be held in contempt and found accountable for plaintiff's attorney's fees

based on the violation of the automatic stay which occurred when they refused to turn over the car until plaintiff paid the towing and storage charges. However, having raised this argument in his complaint, plaintiff has failed to address it further. The Court is left to conclude that debtor has waived this argument. Moreover, given that there is substantial case law holding that a determination of entitlement to adequate protection, if demanded by a creditor, is a precondition to any turnover required by section 542, e.g., In re World Communications, Inc., 72 B.R. at 501-02, the Court finds no basis to hold that defendants have engaged in sanctionable conduct. Although a creditor may waive its right to adequate protection by failing to timely pursue the remedy while the collateral declines in value, e.g., In re Hinckley, 40 B.R. at 681, the Court finds no dilatory conduct by defendants in the instant case since they raised the issue of adequate protection just three weeks after the automatic stay came into being and only two weeks after the turnover action was filed.

See Order entered this date.

_____/s/ Kenneth J. Meyers
U.S. BANKRUPTCY JUDGE

ENTERED: May 26, 1994